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ADDITIONAL PROTOCOL ON CONSULAR FUNCTIONS TO THE VIENNA CONVENTION ON CONSULAR RELATIONS

Report of the Secretary-General

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I. INTRODUCTION

1. On 9 December 1991 the General Assembly adopted resolution 46/61 entitled "Additional protocol on consular functions to the Vienna Convention on Consular Relations", paragraphs 2 and 3 of which read as follows:

> "The General Assembly,
>
> "...
>
> "2. Invites Member States as well as other States parties to the Convention to submit their views on this question to the Secretary-General in accordance with paragraph 3 of resolution 45/47;
>
> "3. Requests the Secretary-General to submit to the General Assembly at its forty-seventh session a further report containing the replies received under paragraph 2 above".

2. Pursuant to the above request, by a note dated 19 February 1992, the Secretary-General invited the Governments of Member States as well as of other States parties to the Convention to submit the replies referred to in paragraph 3 of resolution 46/61.

3. The present report reproduces the replies that had been received as at 14 July 1992. Any further replies will be reproduced in addenda to the present report.

II. REPLIES RECEIVED FROM MEMBER STATES AND OTHER STATES PARTIES TO THE CONVENTION

AUSTRALIA
(also on behalf of Canada and New Zealand)

[Original: English]

[29 June 1992]

1. Australia appreciates the efforts of Austria and the Czech and Slovak Federal Republic to elaborate and supplement the provisions relating to consular functions contained in article 5 of the Vienna Convention on Consular Relations.

2. Article 5 of the Vienna Convention specifies 12 of the primary consular functions and provides in article 5 (m) that the sending State may also entrust to the consulate other functions not prohibited by the laws of, or not objected to by, the receiving State, or which are agreed to by the sending and receiving States.

3. Australia recognizes the lack of uniformity within the international community regarding the scope of consular functions exercised pursuant to

article 5, but notes that the perceived need for flexibility in the exercise of consular functions was the reason for the adoption of a non-inclusive definition of consular functions by the diplomatic conference concluding the Convention.

4. Australia considers that careful consideration should be given to the proposal to enumerate additional consular functions and to further elaborate existing functions. Such a course could both limit the scope of consular functions and detract from the discretion exercised by States in deciding which consular functions are to be performed.

5. Australia is of the view that this matter should be further considered and finally resolved at the forty-seventh session of the General Assembly.

CUBA

[Original: Spanish]

[18 June 1992]

1. The Government of Cuba wishes to reiterate the view it has already expressed: the Vienna Convention on Consular Relations of 1963 is a carefully drafted legal instrument, which remains valid and takes due account of matters relating to consular functions.

2. Article 5 of the aforesaid Convention correctly lists the 13 principal consular functions, thus allowing for a clear interpretation and facilitating the utilization and implementation of the document.

3. Furthermore the aforesaid instrument provides for the possibility of signing bilateral agreements, thereby allowing for expeditious handling of such functions by this means. This is graphically illustrated in connection with the amount of time the authorities of the receiving country have in which to notify the sending country of the arrest of one of its citizens, a matter that, owing to the differences concerning these periods that exist between the various national legislations, is easier to settle through the bilateral channel.

4. The protocol itself causes us the following concerns: article 3 of the protocol lists the notarial functions of consulates. In view of the fact that notarial functions differ from one country to another, it would be preferable to avoid placing limitations on these activities; for this reason the Government of Cuba finds the wording of article 5, paragraph (f), of the Convention of 1963 more acceptable. Moreover, the draft gives the receiving State the power to legalize documents of the sending State; this is not compatible with Cuban legislation.

5. Likewise, the dissimilar problems that arise in relation to nationality could become a source of conflict, given the possibility that the consulate

would have, under article 5 of the draft under discussion, to issue certificates of nationality.

6. The Government of Cuba considers that, on the whole, the Vienna Convention on Consular Relations correctly lists the functions that are set forth in article 6 of the additional protocol; in its view, the latter makes these functions unnecessarily broad. The Government of Cuba believes that the same is true regarding article 11 of the draft protocol with respect to the powers that were clearly stated in articles 5 (k) and (l) of the Convention.

7. With regard to article 15 of the draft, the Government of Cuba feels it is not proper to set a fixed deadline for the authorities of the receiving country to notify the official of the sending State concerning the aspects covered by that article, since these deadlines vary according to the national legislation of each country. In the view of the Government of Cuba, it would be better to keep the phrase "without delay" used in the Convention of 1963.

8. The Government of Cuba will be happy to participate in the informal consultations to be held during the forty-seventh session, and hopes that these preliminary views will be of some use in the context of the discussions.

GUATEMALA

[Original: Spanish]

[6 April 1992]

I. BACKGROUND

1. The exercise of consular functions is based on the Vienna Convention on Consular Relations of 24 April 1963. However, the sphere of consular functions has expanded owing to the increase in relations between States, prompting the latter to conclude bilateral agreements to regulate consular functions in greater detail, on the basis of article 73, paragraph 2, of the aforementioned Vienna Convention, which states: "Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof".

2. Taking the foregoing into account, the General Assembly, at its forty-fifth session, adopted resolution 45/47 of 28 November 1990, entitled "Additional protocol on consular functions to the Vienna Convention on Consular Relations", in which the Assembly agreed, among other things, to request the Secretary-General to seek the views of Member States and of other States Parties to the Vienna Convention on Consular Relations on the proposal by the Chargés d'affaires a.i. of the Permanent Missions of Austria and Czechoslovakia to the United Nations concerning the elaboration of an additional protocol on consular functions to the Vienna Convention and to submit a report thereon to the Assembly at its forty-sixth session.

3. Guatemala, which is a State Member of the United Nations and a Party to the Vienna Convention on Consular Relations, therefore wishes to express its views on the elaboration of an additional protocol to the Vienna Convention with a view to regulating consular functions.

II. CONSIDERATIONS

Analysis of the draft additional protocol on consular functions to the Vienna Convention on Consular Relations submitted to the forty-fifth session of the General Assembly in accordance with the request of the Chargés d'affaires a.i. of the Permanent Missions of Austria and Czechoslovakia to the United Nations

4. The draft additional protocol contains precise rules relating to consular functions, but the preamble to the draft states that questions not expressly dealt with would continue to be governed by rules of customary international law. In general, the draft deals with the following functions:

(a) Communication with nationals of the sending State;

(b) Issuance of passports, visas and travel documents;

(c) Acting as civil registrar;

(d) Acting as notary;

(e) Safeguarding the rights and interests of nationals of the sending State in cases of succession mortis causa, and of minors, other persons lacking full capacity, and absent persons;

(f) Representing nationals of the sending State before the tribunals and other authorities of the receiving State;

(g) Executing letters rogatory or commissions to take evidence;

(h) Exercising rights of supervision and inspection in respect of vessels and aircraft.

5. Article 1 states that the definitions listed in article 1, paragraph 1, of the Vienna Convention on Consular Relations shall be applied. It also states that the provisions relating to nationals of the sending State shall apply, mutatis mutandis, to legal persons and partnerships under commercial law which are established in accordance with the laws and regulations of the sending State or which have their head office in that State.

6. Article 2 refers to the consular functions of issuing passports and travel documents to nationals of the sending State and the issuance of visas to persons wishing to travel to the sending State, to leave it or to pass in transit through it.

7. Article 3 concerns the consular functions of acting as civil registrar and authenticating signatures and documents. However, the Spanish text of the draft protocol uses the expression "autorizar firmas o documentos", although it would be more advisable to use the expression "autenticar firmas o documentos".*

8. Article 4 deals with the consular function of acting as notary, which is very broad in scope, for the following reasons:

(a) All consular officers must be notaries and must moreover be fully familiar with the laws and regulations of the receiving State. Although these requirements are not expressly mentioned, they will be necessary for the exercise of the functions mentioned in this article.

(b) In the specific case of Guatemala as a receiving State, the consular functions involved in acting as notary conflict with its internal law (articles 28 and 29 of the Judicial Organization Act; and articles 2 and 5 and article 6, paragraph 2, of the Notarial Code).

9. It should be noted that the Guatemalan law relating to notarial consular functions follows a system that is more efficient and above all is compatible with the legal order of other States, as envisaged in article 4 of the Judicial Organization Act and article 6, paragraph 2, of the Notarial Code.

10. Article 5 refers to the consular function of accepting for safe keeping documents, cash, valuables and other articles belonging to nationals of the sending State. Paragraph 2 of the article states that the articles accepted for safe keeping for return to their owners, who are nationals of the sending State, may be exported from the receiving State only where such export is not contrary to the laws and regulations of that State; it should be added that the relevant tax laws must be complied with if such exports are subject to tax.

11. Article 6 refers to the consular functions of certification, translation, execution of letters rogatory or commissions to take evidence and provision of legal assistance.

12. Article 7 covers the consular function of protecting the rights and interests of minors or other persons requiring trusteeship, or of absent persons, who are nationals of the sending State.

13. Article 8 covers the case of the death of a national of the sending State in the receiving State.

14. Article 9 refers to the consular function of representing nationals of the sending State before the tribunals and other authorities of the receiving State.

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* Translator's note: The suggestion involves a drafting change in the Spanish text and does not affect the English text.

15. Articles 10 to 14 concern the consular functions relating to the exercise of rights of supervision and inspection in respect of vessels and aircraft; the following points should be noted in this regard:

(a) Articles 10 and 11 deal in greater detail and scope with the consular functions referred to in article 5, paragraphs (k) and (l), of the Vienna Convention.

(b) Article 12 provides that where an authority of the receiving State intends to take any coercive measures or institute an investigation on board a vessel or aircraft of the sending State, or if the master or a member of the crew of a vessel of the sending State is taken ashore, or if a comparable measure is taken with regard to the captain or a member of the crew of an aircraft of the sending State, the authorities of the receiving State shall so notify the consular officer before the measure is begun, in order that the consular officer may be present when the measure is carried out. This rule might be prejudicial to the receiving State, but it could be accepted, since the same article states that if, in urgent cases, the consular officer cannot be notified in advance, the authorities of the receiving State shall inform him of the measures which have been taken; furthermore, it states that the article shall not apply to customs, passport or sanitary inspection or to actions taken at the request or with the consent of the master of the vessel or the captain of the aircraft.

16. Article 15 refers to the consular functions exercised when the authorities of the receiving State deprive a national of the sending State of his personal freedom or restrict that freedom. The provisions of this article are compatible with the laws and regulations of Guatemala and amplify the provisions of article 36, paragraph 1 (b) and (c), of the Vienna Convention. Article 15 also provides that the consular officer may propose that criminal proceedings against a national of the sending State shall be conducted in that State. This provision is acceptable, since it involves a request and not an order; moreover, the article states that the proposal must be in accordance with the laws and regulations of the receiving State.

17. Article 16 states that the provisions of the additional protocol shall not affect other international agreements in force and that States parties may in the future conclude international agreements confirming or supplementing or extending or amplifying the provisions of the protocol.

18. Articles 17 to 22 contain the general rules relating to the signature and ratification of the additional protocol, accession to the protocol, the deposit of the relevant instruments and the date of entry into force of the protocol.

III. CONCLUSION

19. This Department takes a favourable view of the draft additional protocol on consular functions to the Vienna Convention on Consular Relations. Nevertheless, in accordance with the foregoing considerations, the following changes should be made.

IV. RECOMMENDATIONS

20. This Department considers that the following amendments should be made to the draft additional protocol on consular functions to the Vienna Convention on Consular Relations:

(a) First amendment*

Article 3, paragraph 1 (d), reads: "Autorizar documentos expedidos por autoridades competentes del Estado receptor ..."; we suggest that it should read: "Autenticar documentos expedidos por autoridades competentes del Estado receptor ...".

(b) Second amendment*

Article 3, paragraph 1 (e), reads: "Autorizar la firma de nacionales del Estado acreditante estampada en documentos, ..."; we suggest that it should read: "Autenticar la firma de nacionales del Estado acreditante estampada en documentos, ...".

(c) Third amendment*

Article 3, paragraph 1 (f), reads: "Autorizar la firma de nacionales del Estado receptor estampada en documentos ..."; we suggest that it should read: "Autenticar la firma de nacionales del Estado receptor estampada en documentos ...".

(d) Fourth amendment

Article 4 reads:

> "Consular officers shall also have the right to draw up or authenticate in notarial form in the receiving State the following legal acts and contracts provided that they are not contrary to the laws and regulations of the receiving State:

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* Translator's note: The first, second and third amendments suggest that in the Spanish text the word "autorizar" should be replaced by "autenticar"; no change is required in the English text.

"(a) Legal acts and contracts between nationals of the sending State, as well as unilateral legal acts of such persons, provided that such legal acts and contracts do not result in the establishment, alteration or abrogation of rights in respect of immovable property situated in the receiving State;

"(b) Testamentary dispositions of nationals of the sending State or other declarations relating to the estates of such nationals;

"(c) Legal acts or contracts relating exclusively to property situated in the sending State or to business being conducted in that State, irrespective of the nationality of the parties."

We suggest that article 4 should read as follows:

"In the receiving State, consular officers shall have the right to authenticate acts, contracts and instruments in accordance with the laws and regulations of the sending State, when:

(a) The consular officers are notaries recognized in the sending State; and

(b) The acts, contracts and instruments are to have effect in the sending State".

(e) Fifth amendment*

Article 5, paragraph 1 (b), reads: "Aceptar de las autoridades del Estado acreditante, a los efectos de devolverlos a sus propietarios, ...". It should read: "Aceptar de la autoridades del Estado receptor, a los efectos de devolverlos a sus proprietarios, ...".

(f) Sixth amendment

Article 5, paragraph 2, reads:

"The articles accepted for safekeeping in accordance with paragraph 1 may be exported from the receiving State only where such export is not contrary to the laws and regulations of that State."

We suggest that it should read:

"The articles accepted for safe keeping in accordance with paragraph 1 may be exported from the receiving State only where such

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* Translator's note: The fifth amendment corrects an error in the Spanish translation of the additional protocol - "Estado acreditante" is to be replaced by "Estado receptor": no change is required in the English text.

export is not contrary to the laws and regulations of that State and where, as appropriate, the relevant export tax laws are complied with".

(g) Seventh amendment*

Article 15, paragraph 1, reads: "A los efectos de llevar a la practica lo dispuesto en los apartados b) y c) del articulo 36 de la Convencion ..."; we suggest that it should read: "A los efectos de llevar a la practica lo dispuesto en los apartados b) y c) del parrafo 1 del articulo 36 de la Convencion ...".

PORTUGAL
(on behalf of the European Economic Community and its Member States)

[Original: English]

[30 June 1992]

1. The Twelve have taken note with interest of the proposal by the Federal Minister for Foreign Affairs of the Republic of Austria and the Minister for Foreign Affairs of the Czech and Slovak Federal Republic concerning the elaboration of an additional protocol on consular functions to the Vienna Convention on Consular Relations (A/45/141). The Twelve firmly believe that the Vienna Convention on Consular Relations contributes to friendly relations among nations and plays an essential role in creating favourable conditions for the activities of consular posts and for the conduct of consular relations. This Convention contains only one article on consular functions.

2. Article 5 lists 12 consular functions and declares in article 5 (m) that consular officers may also perform any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State. The proposed additional protocol seeks to develop and specify to a certain extent the functions listed in article 5 and to elaborate on the remainder referred to in article 5 (m).

3. Many States Parties to the Vienna Convention, including the Twelve, have also concluded a number of bilateral consular agreements that describe in more detail the functions listed in the Convention and sometimes also other functions. States that have a network of bilateral consular agreements might

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* Translator's note: The seventh amendment corrects an omission in the Spanish translation of the additional protocol by inserting "del parrafo 1": no change is required in the English text.

have no particular need for a new multilateral instrument on consular functions. However, the Twelve are well aware that not every State Party to the Vienna Convention has such a network of bilateral consular agreements, and that for this reason some States may see advantages in an additional protocol on consular functions. The advantages of uniformity would however have to be weighed against a possible limitation on the freedom to negotiate with other States on a bilateral basis, as was pointed out by the Permanent Representative of the Netherlands in his statement on behalf of the Twelve in the Sixth Committee on 20 November 1991.

4. With respect to the procedure to the followed in considering the item entitled "Additional protocol on consular functions to the Vienna Convention on Consular Relations" during the informal consultations at the forty-seventh session of the General Assembly, the Twelve submit that careful consideration of the advantages to be reaped by an additional protocol and of the possibilities of success in negotiating it is called for, taking into account also the problems of harmonization of domestic legislation. In this respect, the Twelve are of the opinion that the above consideration should be completed as soon as possible, in order to render possible the adoption of a final decision on the matter at the forty-seventh session of the General Assembly.